Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

W. S. HARBERT,
IRA W. BUELL,
SOLICITORS FOR DEFENDANTS IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

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The bill in this case was originally filed on June 12, 1882. In addition to all the proceedings which took place in the Circuit Court of Cook County, Illinois, the case has been twice to the Appellate Court of the First district of Illinois, and three times to the Supreme Court of the state and once before in this court. During this protracted litigation, covering a period of fifteen years, all the facts in the case have been sifted and re-sifted and argued and re-argued before the courts of Illinois to such an extent that a single copy of the briefs of counsel in this case

would compose a volume of several hundred pages. Having run its course in the courts of the State of Illinois, the case is brought for a second time to this court by a writ of error to the Supreme Court of the state, upon the alleged ground that a Federal question is involved and under the guise of that issue it is sought by counsel for plaintiffs in error to re-try the issues in this court.

This case was before this court at the October term, 1895, upon a former writ of error to the Supreme Court of the State of Illinois, to review a judgment rendered by that court on June 12, 1890, which writ upon a hearing was dismissed upon the ground that the judgment of the Supreme Court of the State of Illinois was not a final judgment.

Union Mutual Life Ins Co. v. *Kirchoff*,
160 U. S., 374.

The decision of the Supreme Court of the state above referred to, affirmed the judgment of the Appellate Court of the First district, which reversed and remanded the cause to the Circuit Court of Cook County, for the purpose of an accounting between the parties as prayed in the bill and thereupon entering a decree in favor of defendant in error; and this court held that until such accounting was had the decree was not final.

After the decision of the Supreme Court of Illinois, to which the former writ of error was prosecuted, the accounting was had in the Circuit Court of Cook County and another decree entered. The cause was then appealed by the Insurance Company to the Appellate Court of the First district, which affirmed the decree of the Circuit Court (51 Ill. App., 67), from which decision an appeal was prosecuted to the Supreme Court of the state, which

affirmed the judgment of the Appellate Court. (149 Ill., 536.) It is to reverse this last judgment of the state Supreme Court that this writ of error is prosecuted.

The Record.

Presented in chronological order, the proceedings ran as follows:

Original bill filed June 12, 1882. Amended bill filed March 10, 1887. Bill dismissed July 12, 1887, and decree.

From this decree an appeal was prosecuted directly to the Supreme Court of the State of Illinois, but was there dismissed, on the ground that it should have been taken to the Appellate Court. (128 Ill., 199.)

Thereupon a writ of error was taken from the Appellate Court of Illinois to the trial court, and upon the hearing of that writ, January 26, 1893, the Appellate Court reversed the decree of the Circuit Court and the cause was remanded for further proceedings in conformity with the opinion of the Appellate Court. The order of reversal will be found in the record at page 301. The opinion of the Appellate Court filed in the court below is in the printed record at page 399. (33 Ill. App., 607.) This opinion, being brief, is here reproduced in full: "The "facts in this case, as established by a preponderance of "evidence, are that in May, 1871, the Insurance Company "loaned $60,000 to the complainant and plaintiff in "error, and her husband, Julius Kirchoff, and her mother, "Angela Diversey, upon their note, secured by a trust "deed, conveying many parcels of land belonging to them "in severalty, among which were lots 2 and 4, in block "21, of the Canal Trustees' Subdivision of the south

"fractional quarter Sec. 3, T. 39 N., R. 14 E. 3d P. M.,
"which were the property of the complainant.

"In 1878 there was default in payment. Reasons not
"very clearly shown by the record led to negotiations
"which resulted in the conveyance by the mother, of all
"her lands included in the deed, except forty acres which
"the company released to her, and by the complainant
"and her husband of all their lands included in the deed,
"which conveyances the company accepted in satisfaction
"of their debt; but as part of the transaction it was
"agreed that the complainant might purchase from the
"company those lots for $10,000, the terms for the pay-
"ment of which are involved in considerable uncertainty,
"except that they were to extend over a period, proba-
"bly of nine years, but which certainly has now elapsed,
"and the rate of interest was to be six per cent.

"She filed her bill to have the benefit of this agree-
"ment. The bill was dismissed upon the hearing. As
"was said in *Sargent* v. *Howe*, 22 Ill., 148, the deed of
"trust in this case 'only differs from a mortgage with
"power of sale in its being executed to a third person in-
"stead of the creditor'; and, therefore, the dealings be-
"tween the parties are within the rule applicable to
"mortgagors and mortgagees: 'that the courts look
"upon their transactions with jealousy.' 1 Jones Mtg.,
"711.

"The evidence as to the agreement is by the testimony
"of Julius Kirchoff, E. A. Warfield, then general agent,
"and R. B. Kendall, then attorney of the company, and
"it was made between Julius Kirchoff, acting for the
"complainant, and Warfield, with some participation by
"Kendall, acting for the company.

"The authority of Warfield to act for the company

"under circumstances as shown by this record has been "affirmed by the Supreme Court in the cases of this "*Company* v. *White*, 196 Ill., 69, and v. *Slee*, 110 Ill., "35. The testimony of Julius Kirchoff is much weak- "ened by the inconsistency of his conduct afterwards "with the agreement, but it is so corroborated by War- "field and Kendall that there is sufficient proof of the "agreement.

"Before the conveyance to the company the company "had commenced foreclosure proceedings, in which they "sought to reform the description of part of the lands of "Mrs. Diversy. She had answered, contesting it and "alleging a defense, which, if successful, would have in- "validated most, if not all, of the papers she had exe- "cuted. The company understood, whether correctly or "not is immaterial, that they could make no adjustment "with her without the assent of the Kirchoffs. There "were, therefore, considerations to induce the company "to make the agreement, and that they did make it is "satisfactorily proved, and they have had from it all the "benefit they proposed to obtain by it. The foreclosure "proceedings went on after the conveyance, to cut off "the intervening title, but with the agreement that it "should not affect the agreement as to the lots described.

"The company obtained deeds under the foreclosure in "January, 1882, but refused to perform the agreement "made by Warfield. As to the effect of this agreement, "the rule in equity, 'once a mortgage always a mort- "gage,' applies.

"As was said in *Enner* v. *Thompson*, 46 Ill., 215, "'When the mortgagor has conveyed the mortgaged "premises to the mortgagee, it only operates as a bar to "the equity of redemption, when it clearly and unequivo-

"cally appears that both parties so understood and in-
"tended it should.'

"Here the contrary as to the two lots clearly and une-
"quivocally appears; and it does not affect the complain-
"ant's right to redeem those lots that as to the residue
"of the mortgaged property there is no redemption, and
"that she proposed to pay but a small part of the origi-
"nal debt. When by the operation of law upon the acts
"or by the agreement of the parties the debt has been
"apportioned and a part of it made the sole burden upon
"a part of the incumbent property, that part may be re-
"deemed by paying that part of the debt apportioned to
"the part redeemed. *Meecham* v. *Steele*, 93 Ill., 135;
"*Mutual Mills Ins. Co.* v. *Gordon*, 121 Ill., 366.

"The complainant filed her bill to redeem in June, 1882.
"The lots she was to redeem and the principal sum she was
"to pay, as well as the rate of interest are definitely fixed
"by the agreement.

"The term at which the interest was to begin and the
"amounts and times of payment of the installments are
"left uncertain; but this is not a bill for specific per-
"formance, *it is an appeal to a court of equity by the*
"*complainant that she may have her property restored to*
"*her upon the terms that she shall discharge the burden*
"*upon it, fixed in amount by agreement, and which, if*
"*that agreement had been executed and performed, would*
"*have been discharged in the time that has elapsed.*

"She is now entitled to the benefit of that agreement
"upon the terms that she, within a short time after the
"amount is ascertained, pay it.

"The decree is, therefore, reversed and the cause re-
"manded to the Circuit Court with directions to that
"court to have an account taken of the amount due the

"company, crediting them with the principal sum of "$10,000 and interest thereon at six per cent. from Sep- "tember 10, 1879, the day of the delivery of the deed "of the complainant and her husband, together with "whatever the company has paid for taxes, assessments, "insurance, repairs, and other expenses upon the prop- "erty, so far as the same may be found to have been "reasonably necessary, and charging them with the rents "and profits which they have or by ordinary care and "diligence ought to have received from the property, in- "terest to be allowed upon the disbursements if not repaid "by the rents and profits (but there is to be no com- "pounding of interest) and, when the amount due the "company is ascertained, to enter a decree that upon the "payment of that amount, with interest thereon, within "ninety days thereafter, the company convey to her, and "that in that event she recover her costs.

"But if she do not so pay, the bill will be dismissed at "her costs.

"*Bremer* v. *Canal and Dock Co.*, 127 Ill., "464."

From this decision, the Insurance Company prayed an appeal to the Supreme Court of the state. (Pr. Rec., 303.)

The assignment of errors therein is as follows:

"1. The Appellate Court erred in that its findings and "judgment are contrary to the evidence.

"2. The Appellate Court erred in that its findings "and judgment are contrary to the law.

"3. The Appellate Court erred in reversing and re- "manding the decree of the Circuit Court of Cook "County.

"4. The Appellate Court erred in not affirming the "decree of the Circuit Court of Cook County.

"5. The Appellate Court erred in holding that ap- "pellee was entitled to redeem.

"6. The Appellate Court erred in holding that ap- "pellee was entitled to redeem upon the payment of $10,- "000 and interest thereon at six per cent. instead of eight "per cent., as stipulated in the mortgage debt.

"7. The Appellate Court erred in holding that ap- "pellee was entitled to redeem on the payment of $10,- "000 and interest, instead of $17,000, the amount for "which the lots were bid in at the sale.

"8. The Appellate Court erred in admitting as com- "petent evidence, impeaching the recital of the quit- "claim deed of appellee to the effect that it was given in "satisfaction of the indebtedness.

"9. The Appellate Court erred in permitting Julius "Kirchoff to testify in behalf of his wife, the appellee.

"10. The Appellate Court erred in reversing the de- "cree of the Circuit Court and remanding with special "instructions, instead of remanding generally."

"Wherefore appellant prays that said judgment of Ap- "pellate Court may be reversed."

(Signed by Counsel.)

(Pr. Rec., 303.)

(*It will be seen that no Federal question was raised by the assignment of errors.*)

The Supreme Court affirmed the judgment of the Appellate Court. The order of affirmance and opinion rendered at the same time appearing in the printed record at page 305 (133 Ill., 368). To this judgment of the Supreme Court of Illinois a writ of error was prosecuted from this court but upon a hearing was dismissed

on the ground that the judgment of the Supreme Court was a final judgment (160 U. S., 374).

In the meantime the order of the Appellate Court which directed an accounting, had been carried out and a decree entered settling the accounts between the parties and ordering the Insurance Company to convey the property in question upon the payment of the amount found due, to wit: $18,858.54, or in default thereof that the master in chancery make the conveyance, had been entered. (Pr. Rec., 409.)

From this decree the Insurance Company appealed to the Appellate Court, which affirmed the decree of the Circuit Court, the order of affirmance appearing on page 511 and the accompanying opinion on page 514. (51 Ill. App., 67.)

This second judgment of the Appellate Court was also affirmed by the Supreme Court, the order and opinion appearing in the record at page 515. (149 Ill., 536.)

The money required to be paid by Mrs. Kirchoff was duly paid and the master thereupon executed to her a conveyance of the property. To this last judgment and order of the Supreme Court of the state, the Insurance Company prosecuted a writ of error, now here presented. As before stated, this cause was before this court at the October term, 1895, upon a former writ of error to the Supreme Court of the state, to review a judgment rendered in that court on June 12, 1890, which writ upon a hearing was dismissed upon the ground that the judgment of the Supreme Court of the State of Illinois was not a final judgment.

Union Mutual Life Ins. Co. v. *Kirchoff*, 160 U. S., 374.

Last September the following motion was made:

"Now comes Elizabeth Kirchoff, the defendant in "error, by George R. Daley, her solicitor, and moves "the court to dismiss the writ of error herein, for want "of jurisdiction, and further moves that in case the "court shall find it has jurisdiction of the case, then that "it affirm the judgment of the Supreme Court of the "State of Illinois, because it is manifest the said writ of "error was taken for delay only, and that the question "on which the jurisdiction of the court depends is so "frivolous as to not need further argument.

"(Signed) GEORGE R. DALEY,
"*Solicitor for Defendant in Error.*"

The hearing of that motion was by order of this court postponed, to be taken up when the cause should be reached on the calendar. A very large portion of the argument of plaintiff in error consists in a discussion of the effect of the evidence, and if we do not join in the discussion *it is not from any hesitancy in discussing the facts involved in the case, but because we do not understand that these facts are in issue upon the hearing of this writ of error. All the facts necessary to a complete understanding of the case are set out in the opinion of the Supreme Court of the state.* (*Pr. Rec. 305.*) As we understand the practice, the inquiry of this court extends merely to ascertaining:

I. WHETHER A FEDERAL QUESTION IS INVOLVED.

II. IF SO, WHETHER THAT QUESTION WAS CORRECTLY DECIDED BY THE STATE COURT.

We shall, therefore, address ourselves to these questions in their order, without discussing the facts any further than may be necessary to an understanding of those questions and the scope of the findings of the state courts.

STATEMENT OF FACTS.

The facts are well stated in the report of the case upon the hearing of the former writ of error. We quote same from that report as follows (160 U. S., 374):

"On May 8, 1871, Julius Kirchoff, being engaged in "the distillery business in Chicago, borrowed $60,000 of "the Union Mutual Life Insurance Company, and to se- "cure the payment thereof, executed together with his "wife, Elizabeth, and her mother, Angela Diversey, a "joint judgment note for $60,000 and a trust deed cover- "ing certain real estate in Chicago, belonging to Kirchoff "and his wife, and certain other property, including a "farm in Cook County, owned by Mrs. Diversey. The "money received from the loan was put in the bank to "the credit of the firm of Kirchoff Bros. & Co., which "soon after failed.

"In 1876, default having been made in the payment "of interest and taxes, judgment was taken against "Mrs. Diversey on the note after certain unsuccessful "negotiations towards funding the indebtedness into a "new loan at a lower rate of interest, and on July 11, "1878, proceedings were commenced in the Circuit "Court of the United States to foreclose the trust deed. "The bill in addition sought to cure a misdescription of "the property belonging to Mrs. Diversey, who filed an "answer denying the right of the company to cure the "misdescription and averring that the notes and mort- "gage were procured from her by misrepresentation.

"From this time the relation of the parties seems to "have remained unchanged until June, 1879, when an

" agreement was reached by which the company released " to Mrs. Diversey its claim upon forty acres of the land " belonging to her, and she executed to it a warranty " deed for the remainder of the premises. About the " same time, Mrs. Kirchoff and her husband executed a " quitclaim deed of all the property belonging to them " and included in the mortgages. The deed from Mrs. " Diversey was immediately placed on record, but the " deed from the Kirchoffs was withheld by the agent and " attorney of the Insurance Company.

" It was claimed by Mrs. Kirchoff that during the " negotiations which culminated in the execution of the " above deeds, it was agreed that the Insurance Com- " pany should re-convey to her two lots included in her " deed, one of which was then occupied as a homestead, " the other cornering upon it, but facing the other way ; " that the price at which the re-conveyance should take " place was their valuation at a previous appraisement " made by one Rees, viz : $7,500 and $2,500, respectively, " and that Mrs. Kirchoff was to execute in payment " therefor her notes for $10,000, extending over a period " of ten years, bearing interest at six per cent., and se- " cured by a mortgage upon the two lots. It seems " there were certain intervening claims on one of the " lots, growing out of a sheriff's deed, executed pur- " suant to a sale on a judgment against Mrs. Kirchoff, " rendered subsequently to the original trust deed, but " prior to the deed from Kirchoff and wife to the com- " pany, which rendered necessary a further prosecution " of the foreclosure proceedings in order that the company " might obtain a good title to the premises, so as to " convey a clear title to Mrs. Kirchoff and take from " her a mortgage which would be a first lien thereon. It

"is claimed that this matter was explained to Mrs. "Kirchoff, her husband and agent, and he was assured "that the prosecution of the foreclosure proceedings "would not in any manner affect the agreement which "had been made, but that, as soon as the company got a "deed from the master in chancery, it would carry out "its part of the contract by conveying to Mrs. Kirchoff "the premises in question, and would then take the mort- "gage from her. She alleged that, relying upon thi "agreement, no defense was made to the foreclosure pro- "ceedings by her, and the same were prosecuted to a de- "cree, and the master's deed issued thereon to the Insur- "ance Company January 21, 1882. The object of the "bill in this case was to insist upon this right of remp- "tion, in accordance with its terms.

"The Insurance Company, on the other hand, con- "tended that an inspection of the record showed that "no such agreement was ever concluded, and that the "state court was bound by the decree of the Federal "court foreclosing the mortgage, and had no jurisdic- "tion to review it. It was not disputed that proposi- "tions similar to the so-called agreement were dis- "cussed between the Kirchoffs and the agents of the "Insurance Company, or that assurances were given "by the latter of the probable willingness of the Insur- "ance Company to sell the land on the terms named; "but it is claimed that when the Insurance Company was "advised of the proposition, it was instantly and un- "equivocally declined, and this action of the company "communicated to Mrs. Kirchoff in time to prevent any "injury to her from the quitclaim deed. That, after hav- "ing been thus fully advised, she elected to deliver the "deed, and in that manner get the benefit of the release "from her indebtedness.

"A demurrer was filed to the bill, which was over-
"ruled, when defendant answered, denying the agree-
"ment for redemption set forth in the bill, and also set-
"ting up the statute of frauds as a defense. The case
"coming on for hearing upon pleadings and proofs, the
"bill was dismissed for want of equity. An appeal was
"taken to the state Supreme Court which was dismissed
"upon the grounds that the case should have gone to the
"Appellate Court. 128 Illinois, 199. Whereupon the
"complainant sued out a writ of error from the Appel-
"late Court of the First district of Illinois to the Cir-
"cuit Court of Cook County, and upon a hearing in the
"Appellate Court the decree of the Circuit Court was re-
"versed, with directions to enter a decree in accordance
"with the opinion of the Appellate Court. 33 Illinois
"App., 607. This opinion was not sent up with the
"record in this case. From the decree of the Appellate
"Court the Insurance Company prosecuted an appeal to
"Supreme Court of the state, which affirmed the decree
"of the Appellate Court. 133 Illinois, 368."

The foregoing is a statement of the case as it appeared to this court upon the former hearing. There is also a full statement of the facts in the first opinion of the state Supreme Court. (Pr. Rec., 305; 133 Ill., 608.)

Justice WILKIN, delivering the opinion of the State Supreme Court at the last hearing of this cause, (149 Ill., 536) says (Pr. Rec., 516):

"The controversy was whether a contract had been
"entered into between the parties whereby the company
"in consideration of the quitclaim deed by Mrs. Kirchoff
"to it, and the payment of a certain sum of money, had
"agreed to reconvey to her the lots in question, and
"whether, if such an agreement was made, the com-

" plainant was entitled, under all the facts of the case, to " enforce it in this action. The terms of the contract and " all the facts are there fully stated and the merits of the " case settled adversely to the company.

" On the remandment of the cause to the Circuit Court " it was referred to a master to state the account, in con- " formity with the directions given in the opinion of the " Appellate Court.

" On the coming in of his report the same was approved " and a decree entered requiring the complainant to pay " the defendant $18,858.54 and interest within ninety " days, and thereupon the defendant to convey to her the " premises."

This payment the complainant made in accordance with the decree and the master executed to her a deed, and she was put in possession of the premises.

From this decree, as before said, the company appealed to the Appellate Court, where a judgment of affirmance was entered, and it now prosecutes its second writ of error thereto.

The court further says in the same opinion:

" Much of the argument of counsel for appellant is de- " voted to an effort to show a want of jurisdiction in the " Circuit Court of Cook County over the subject-matter " of this litigation.

" Whether upon this second appeal that is an open " question we do not deem it important to determine, " being clearly of the opinion that the position of counsel " is untenable. It is said the suit is brought to review " and set aside a decree of the United States Circuit " Court, and the bill is treated throughout the discussion " as hostile to the foreclosure proceeding in that court,

"or as attempting to obtain relief properly available in "that action.

"This is a misapprehension of the scope and purpose of "complainant's bill. In our former opinion we said: "'After the settlement had been concluded it turned out "that certain encumbrances existed against some of the "property which were subsequent to the trust deed, but "which would take priority to the quitclaim deed exe- "cuted by complainant and her husband. It, therefore, "became necessary, in order to obtain a perfect title, to "go on with the foreclosure proceedings, which was done.' "This statement is based upon an allegation of the bill to "the effect that it being represented to the complainant by "the attorney of the company that it would be necessary "to foreclose the trust deed in order to make good the "title in the company to the lots before they could take "a mortgage thereon for the installments of redemption "money, it was agreed between the parties that the agree- "ment for redemption should not be executed until after "the title had been perfected in the company by foreclos- "ure, but in the meantime complainants should execute "and deliver to the company her quitclaim deed, and "should interpose no defense to such foreclosure. The "allegation was found in the opinion above referred to, "sustained by proofs, *and is conclusive of that fact upon "this appeal.* The foreclosure decree in this Federal court "was, therefore, as much the result of the agreement re- "lied upon by complainant as was the making of the quit- "claim deed by her. So far from this being an attempt "to review, modify or set aside the decree of the United "States Circuit Court, the right of action is predicated in "part at least upon it.

"Whether the bill be called a bill to redeem, or given

" another name, can in no way affect the question of juris-
" diction in the state court. The relief sought is the en-
" forcement of a contract to reconvey the property in
" question, which we have already held the complainant en-
" titled to. Her rights grow out of the alleged contract,
" and not by reason of anything that was done or could
" have been done in the Federal court in the foreclosure
" suit.

" That a court of equity has jurisdiction to enforce the
" contract whether it be called a contract to redeem or to
" reconvey is, we think too clear for argument. There is
" nothing in *Windett The Connecticut M. L. Ins. Co.*,
" 130 Ill., 621, or *Mahoney et al.* v. *Dewey et al.*, 127th
" Ill., 325, to the contrary.

" On the accounting the company claimed credit for
" items of money expended in payment of taxes and the
" purchase of tax titles against the property prior to the
" agreement to reconvey, which on objection by com-
" plainant, were disallowed. This ruling is assigned for
" construction of the contract. This complainant was to
" pay the full appraised value of the lots, upon which the
" defendant was to reconvey to her. Certainly it was
" not intended that such payment should be made and the
" conveyance executed, and yet the company retain inter-
" est in or lien upon the property. The parties are pre-
" sumed to have entered into the contract with a view to
" the then condition of the property and all existing liens
" and claims in favor of the company against it, and had
" they intended appellee to pay, in addition to the $10,-
" 000, such claims, they certainly would have so stated
" in the agreement.

" It appears that prior to September the 10th, 1884,
" the United States had seized the property for certain

" revenue taxes due from a firm then occupying it as a " distillery, Mrs. Kirchoff, the owner of the property, " being in no way connected with that firm.

" The property was sold, the government bidding it in " and taking a deed for it. On the date named, by a com- " missioner of internal revenue, it conveyed to appel- " lant, and it now attempts to set up that title against ap- " pellee in this suit. It paid the government $500 for the " title or interest it got by the commissioner's deed, and " in the account stated appellee was required to repay it " that amount with interest. We think it clear, upon " the authority of *Mansfield* v. *Excelsior Refining Co.*, " 135 U. S., 326, cited in the argument of counsel for " appellee, the United States took no title by its deed as " against Mrs. Kirchoff. Therefore, by its conveyance " to appellant, the latter at most took only the lien for de- " linquent taxes, and being fully indemnified for the " money expended in obtaining such lien, complete justice " has been done it.

" But if it were otherwise appellant cannot set up any " right under its deed from the government, because " those rights were acquired long prior to the rendering " of the first decree in the Circuit Court, and conse- " quently, to the submission of the case in this court upon " the prior appeal.

" *Nothing is better settled than that 'where a cause has* " *been reviewed by this court and remanded with direc-* " *tions as to the decree to be entered, a party on a subse-* " *quent appeal cannot assign for error any cause that ac-* " *crued or existed prior to the judgment of this court. All* " *errors not assigned will be considered as waived and can-* " *not afterwards be urged.*" *Hook* v. *Richardson et al.*, " *115 Ill., 431; Village of Brooklyn* v. *Orthwein, 140th*

"*Ill.*, *620*, *and cases cited.* There is no error in this "record, so far as we have been able to to discover, "and the judgment of the Appellate Court is therefore "affirmed." (Italics are ours.)

"Affirmed." (Pr. Rec., 516.)

The complete record of the case is now before the court. During the prosecution of the foreclosure proceedings in the United States Circuit Court, a receiver was appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed a petition in said cause, stating that Julius Kirchoff was in possession of the premises in question and refused to pay rent therefor and asking for a writ of assistance to put him (the receiver) in possession. (Pr. Rec., 192.)

To a rule to show cause why such writ should not issue the husband of defendant in error filed an answer setting up the agreement in question as having been made with the company and asking that the writ do not issue lest *his rights* be prejudiced. The court nevertheless, issued the writ, and it is contended that this decision by the court, on this rule, operated as a *res adjudicata* of the issues involved in this case, and that the decree enforcing the claim of defendant in error does not give full faith and credit to this order of the United States Circuit Court.

The state courts found that the contentions of the complainant were established by a preponderance of the evidence and decreed in her favor as prayed. The Supreme Court of Illinois stated the agreement as found by it to be as follows:

"It was a part of the arrangement under which the "complainant was to obtain the two lots in controversy

"that a decree of foreclosure should be entered, and that "the premises should be sold under such decree. The "decree was rendered and the sale made by consent for "the purpose of clearing the different tracts of land "mentioned in the quitclaim deed from certain encum- "brances." * * *

"The substance of the agreement was that complain- "ant was to have the two lots in question, notwithstand- "ing her deed in September, 1879, and notwithstanding "the decree of foreclosure and sale thereunder, upon the "payment of $1,000, and the execution of her notes se- "cured by a mortgage on the premises for the balance, "payable $1,000 each year for nine years, with six per "cent. interest." (Pr. Rec., 311.)

We understand that where the facts are found by the state court, such finding will be considered conclusive.

Egan v. *Hart*, 165 U. S., 188.

And that the opinions of the state courts will be considered part of the record and looked to, to ascertain the questions presented and facts found.

Egan v. *Hart*, *supra*.

Still, notwithstanding this well recognized rule, the plaintiff in error makes a laborious attempt to show that the state courts were not warranted in their conclusions of fact.

If this court has jurisdiction to review the judgment of the Supreme Court of the State of Illinois, it is by virtue of section 709 of the Revised Statutes of the United States, which provides in substance that the final decree of a state Supreme Court may be re-examined by this court where any title, right, privilege or immunity is claimed under an authority exercised under the United States, and the de-

cision is against such title, right, privilege or immunity specially set up or claimed under such authority, that is by reason of a Federal question being involved. *In this case it must appear as a pre-requisite that the right claimed here was urged in the proper way at the proper time and then either*:

1. *That the state courts decided against the title of the company derived under the decree of foreclosure in the United States Circuit Court, the master's sale and deed thereon, or,*

2. *That the decision reviews a matter which was res adjudicata, by reason of the decision on the writ of assistance above referred to.*

BRIEF AND SUGGESTIONS.

First.

THERE IS NO FEDERAL QUESTION INVOLVED AND THE MOTION TO DISMISS SHOULD BE SUSTAINED.

Record and authorities cited below.

I.

THIS COURT HAS NO JURISDICTION FOR THE REASON THAT IT DOES NOT APPEAR THAT THE RIGHT, TITLE, PRIVILEGE OR IMMUNITY NOW CLAIMED WAS SPECIALLY SET UP OR CLAIMED AT THE PROPER TIME AND IN THE PROPER WAY.

Assignment of Errors, Pr. Rec., 303.
Willard v. *Patill*, 153 Ill., 663.
Kirchoff v. *U. Mutual Life Ins. Co.*
Pr. Rec., 305; 51 Ill. App., 67.
Hook v. *Richardson et al.*, 115 Ill., 431.
Village of Brooklyn v. *Orthwein*, 140 Ill., 620.
Ex Parte Spies, 123 U. S., 131.
Chappell v. *Bradshaw*, 128 U. S., 132.
Susquehanna Boom Co. v. *West B. Boom Co.*, 110 U. S., 57.
Story's Eq Plead., Sec., 39?.
1 Van Fleet's Former Adj., 492.
L., I. W. I. Co. v. *Brooklyn*, 166 U. S., 685.

II.

THE TITLE ACQUIRED IN THE FORECLOSURE PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT IS NOT ATTACKED BY THE BILL NOR DISCREDITED BY THE DECREE, AND, THEREFORE, NO FEDERAL QUESTION IS PRESENTED.

a. The bill merely alleges the agreement and asks that it be enforced.

Pr. Rec., 13, 24, 25, 40, 66, 70, 87, 112, 317, 318, 409.

b. The perfecting of the title by the foreclosure proceeding was part of the agreement and the agreement was, therefore, not hostile to the foreclosure proceedings.

Pr. Rec., 318; 33 Ill. App., 612.

Pr. Rec., 112, 311.

149 Ill., 539; Pr. Rec., 516.

Mansfield v. *E. Ref. Co.*, 135 U. S., 326.

c. The decrees in this suit does not disturb the foreclosure proceedings but merely directs a conveyance by the company pursuant to the agreement.

1st Opinion Ill. App. Ct., Pr. Rec., 399; 33 Ill App., 607.

1st Opinion Ill. Sup. Ct., Pr. Rec., 305; 133 Ill., 608.

Decree trial court, Pr. Rec., 409.

2nd Opinion Ill. App., Pr. Rec., 514; 51 App., 67.

2nd Opinion Ill. Sup. Ct., Pr. Rec., 517; 149 Ill., 536.

Opinion U. S. Supreme Ct., 160 U. S., 374.

III.

THERE WAS NOT AND COULD NOT HAVE BEEN ANY ADJUDICATION IN THE FORECLOSURE SUIT OF THE ISSUES IN THIS SUIT.

(Argument *post.*)

a. The application for writ of assistance placed in issue only the right of possession of the premises as between Julius Kirchoff and the receiver and the rights of the parties hereto were in no manner affected by the order issued on said application.

Aspen v. *Nixon*, 4 How., 467.

b. The defendant in error did not and could not while claiming under the agreement as she had a right to do, object to the foreclosure suit or to the decree therein or to the deed thereunder, as they were all contemplated by the agreement.

c. Till after the master's deed issued, Mrs. Kirchoff had no right to demand a conveyance from the company.

IV.

THERE WAS NOTHING IMMORAL, INEQUITABLE, IMPROPER OR WHICH COULD HAVE RESULTED TO THE INJURY OF ANYONE IN THE AGREEMENT.

a. The title was to go to Mrs. Kirchoff and her creditors, if any she had, would be benefited to the exact extent to which she would be benefited.

b. As a matter of fact, the purpose of the foreclosure proceeding was to cut off an adverse title intervening between the mortgage and the Kirchoff quitclaim, and for the

purpose of doing this equity will prevent a merger of the two titles.

There were no unsatisfied judgments against Mrs. Kirchoff.

SECOND.

IF THIS COURT SHOULD HOLD THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN SUCH QUESTION WAS CORRECTLY DECIDED.

a. Proper effect was given to the decree of the Federal court.

Dupasseur v. *Rochereau*, 21 Wall., 130.
Crescent City Live Stock Co. v. *Butchers' Union Slaughter House Co.*, 120 U. S., 141.
Smith v *Adsit*, 23 Wallace, 368.
Wetherell v. *Eberle*, 123 Ill., 668.
Adams v. *Burlington & Mo. R. R. Co.*, 112 U. S., 123.
Murdock v. *City of Memphis*, 20 Wall., 590.
Hale et al v. *Akers*, 132 U. S., 554.
Bacon v. *Texas*, 163 U. S., 207.

b. The agreement was predicated on a valuable consideration and the subject-matter was a proper subject for negotiations.

c. It is not necessary to give the proceeding a label. In chancery a right presupposes a remedy and the course pursued by defendant in error was the only course open to her.

Peugh v. *Davis*, 96 U. S., 332.
Villa v. *Rodridge*, 79 U. S., 323.
Argument *post*.

d. Though the question relates only to the character of the evidence and is, therefore, as we view it, a matter exclusively for the state courts, yet the agreement was not repugnant to the statute of frauds.

McManus v. *O'Sullivan*, 91 U. S., 578.
Romie et al. v. *Casanova*, 91 U. S., 379.
Warren v. *Warren*, 105 Ill., 568.
Beegle v. *Wentz*, 55 Pa. State R., 369.
Morrell v. *Cooper*, 65 Barb., 512.
Langtree v. *Langtree*, 51 Ill., 458.
Fishbeck v. *Gross*, 112 Ill., 208.

e. Issues of fact are not reviewable by this court.

Dower v. *Richards*, 151 U. S., 658.
In re Nagle, 135 U. S., 141.
Kennedy v. *Effinger*, 155 U. S., 577.
Baldwin v. *State of Kansas*, 129 U. S., 52.

ARGUMENT.

First.

THERE IS NO FEDERAL QUESTION INVOLVED AND THE MOTION TO DISMISS SHOULD BE SUSTAINED.

I. *This court has no jurisdiction for the reason that the right, title, privilege, or immunity now claimed was not especially set up or claimed at the proper time and in the proper manner.*

No new issues on the part of the complainant so far as the same effects the Federal question have been raised since the original bill was filed.

No evidence was taken and no issues tendered on the last hearing in the trial court except as to the accounting, concerning which, no question was raised and in which, therefore, this court is not concerned.

The decree of the Appellate Court on the first hearing fixed the rights of the parties as between the plaintiff and defendant, and sustained her contention with respect to the agreement and directed a decree requiring the defendant to convey to the complainant the premises in question.

From this decision the Insurance Company prayed an appeal to the Supreme Court of the state, but as heretofore shown, *the assignment of errors made no claim that the decree raised any Federal question, or denied any right, title, privilege or immunity secured by the Constitution or the slaw of the United States.* (Pr. Rec., 303.) Any objection made thereafter came too late.

The question now relied upon was not raised until after the state Supreme Court had reviewed all errors that had been assigned. The fact that the alleged error was raised on the accounting, where it could not be made to apply except as to the deed from the commissioner of internal revenue, as to which plaintiff in error now raises no question, will not excuse the omission to urge the alleged error as to the decree fixing the rights of the parties.

On a writ of error no errors will be considered which were not assigned.

Willard v. *Patill*, 153 Ill., 663.

Where, upon a motion for a rehearing by the state court, after judgment, it is for the first time suggested that a Federal question is involved, a refusal to allow the motion is not enough to give the Federal court jurisdiction.

Susquehanna Boom Co. v. *West Branch Boom Co.*, 110 U. S., 57.

Errors must be especially pointed out.

Cal. Furn. Co. v. *Reinhold*, 51 Ill. App., 323.

See, also, opinion in this case, 149 Ill., 536.

Hook v. *Richardson et al.*, 115 Ill., 431.

Village of Brooklyn v. *Orthwein*, 140 Ill., 620, and cases cited.

The question of practice is not one of a Federal nature.

L. I. W. S. Co. v. *Brooklyn*, 166 U. S., 685.

When the ground of jurisdiction is the alleged denial of a title, right, privilege or immunity, secured by the Constitution or laws of the United States, it must appear that such title, right, privilege or immunity was specially set up, or claimed at the proper time and in the proper way *Miller* v. *Texas*, 14 S. Ct., 874; 153 U. S., 535; and *Morrison* v. *Watson*, 14 S. Ct., 995; 154 U. S. 111.

A party in order to avail himself of the privileges of Sec. 709, must present his claim to the state courts in apt time. And since this was not done in this case and no Federal question is *necessarily* involved in the decision by the Illinois court, the plaintiff in error is not in a position to now claim the benefit of said section. *Nowhere in the record does it appear that the plaintiff in error set up such claim until after the case had been reversed by the Appellate Court with directions to enter a decree in favor of complainant, and that decision of the Appellate Court had been affirmed by the Supreme Court of the state.*

In the second appeal to the Appellate Court the court say (Pr. Rec., 514): "On a former appeal this case is "reported in 33 Ill. App., 607, and 133 Ill., 368— "what was then decided can not now be reversed and the "reasons then given for such decisions are, on this ap- "peal, the law of the case.

"*Delwerth* v. *Curtis*, 139 Ill., 508, and cases there cited, "are but a few among many. We shall, therefore, omit "any reference to matters of defense by the appellant, "which, if valid, existed before the first appeal. If we "made a mistake in which the Supreme Court concurred, "or if better arguments can now be made for the appellant "than were then made, the result cannot be changed. "The only question now open is upon the account as "taken."

The Illinois Supreme Court, in this very case, have said (Pr. Rec., 518): "*Nothing is better settled than that "where a cause has been reviewed by this court, and re-"manded with directions as to the decree to be entered, a "party on a subsequent appeal cannot assign for error "any cause that accrued or existed prior to the judgment of "this court.* All errors, not assigned, will be consid-"ered as waived, and cannot afterwards be urged."

Also, see,

Hook v. *Richardson et al.*, 115 Ill., 431.
Village of Brooklyn v. *Orthwein*, 140 Ill., 620, and cases cited.

Again, in *Rector* v. *Ashley*, 6 Wallace, 142, it was held that if the judgment of the state court can be sustained on other grounds than those which are of Federal cognizance, this court will not revise it, though a Federal question may have been decided therein and decided erroneously.

So, also,

Bacon v. *Texas*, 163 U. S., 207.
Murdock v. *City of Memphis*, 20 Wallace, 590.

In *Crowell* v. *Randall*, 10 Peters, 368, cited by plaintiff in error, the courts, discussing the Federal question, say: "It is not sufficient to show that a question "*might have arisen* and been applicable to the case, *un-"less it is further shown on the record that it did arise "and was applied by the state court to the case.*"

This court also held that: "A right must be claimed "or set up in the proper court below. As the Supreme "Court of the state can review the decision of the trial

"court, it must be made to appear that the claim was "made in the trial court, because the State Supreme "Court is only authorized to review the judgment of that "court for errors committed there. The United States "Supreme Court can do no more." *Ex parte Spies*, 123 U. S., 131.

II.

The title acquired in the foreclosure proceedings in the the United States Circuit Court is not attacked by the bill nor discredited by the decree, and therefore no Federal question was presented.

a. The bill merely alleges the agreement and asks that it be enforced.

The bill of complaint of defendant in error alleges that after the delivery of her deed, said foreclosure proceeding was prosecuted by consent for the purpose of clearing the title to the premises, and that there was an agreement that when the company should receive its deed from the master it would convey the premises to her. This the defendant (here plaintiff in error) in its answer, denied. The validity of the title derived under the foreclosure proceedings was not called in question. The bill admitted that such a title existed, and the whole controversy rested entirely upon whether there was an agreement for a conveyance by the company to the complainant, which she could enforce in a court of equity. The prayer of her bill is not that the decree in the fereclosure proceeding and the conveyance by the master pursuant thereto be set aside, but that the company be compelled to convey to her. (Pr. Rec., 25.)

Upon reference to the opinion of the Appellate Court (Pr. Rec., 317) it will appear that the court in entering its decree did not attempt to set aside the title acquired by the company under and by virtue of the foreclosure proceeding, but expressly directed the Circuit Court to take an account and "when the amount due the com-"pany is ascertained to enter a decree that upon the pay-"ment of that amount with interest, thereon within "ninety days thereafter, the company convey to her." (Pr. Rec., 318.) The decree of the Circuit Court conforms strictly to this order. (Pr. Rec., 409.)

b. The perfecting of the title by the foreclosure proceeding was part of the agreement. Such are the allegations in the bill (Pr. Rec., 13), and in the amended bill (Pr. Rec., 24) Kendall told Kerchoff the foreclosure would not affect the contract (Pr. Rec., 40–66, 112.) Warfield admits same thing. (Pr. Rec. 70, 87.)

The perfecting of the title by the foreclosure proceeding was part of the agreement and the agreement was therefore not hostile to the foreclosure proceedings.

The Appellate Court found that "the foreclosure pro-"ceedings went on after the conveyance to cut off an in-"tervening title but with the agreement that it should "not affect the agreement as to the lots described." (Pr. Rec., 318; 33 Ill. App., 612.) The legal title had already been conveyed to plaintiff in error and the object of the foreclosure was to remove a cloud and not a claim or judgment. (Pr. Rec., 112.)

"In passing on the contention raised by matters em-"braced in the bill the Illinois Supreme Court said (Pr. "Rec., 311): 'It is also denied (claimed) that complain-"ant's failure to assert the alleged agreement in the

Where the construction of a certain agreement involves no Federal question and is decisive of the entire case, the Supreme Court of the United States will not entertain jurisdiction of a writ of error to the judgment of the state court on the ground that there was also a Federal question raised and decided adversely to plaintiffs in error.

Hale et al. v. *Akers et al.*, 132 U. S., 554:

In this case the court found that the City of Sonoma had established its claim to the land in controversy, within the meaning of a certain contract between Schell and Akers; that by the term of said contract each agreed with the other to abide by the decision of the United States on said claim of the City of Sonoma for said lands, as then pending before the United States Courts, and to abide by the boundary line between them as established, and the final confirmation of Pueblo lands to the City of Sonoma.

The court held that the written contract was intended to be and was decisive of their rights when it was executed; that the parties compromised the pending suit by dividing the 111 acres about equally between them, Akers releasing to Schell the eastern half and retaining the western half; that under the terms of the agreement, the only establishment of the Sonoma claim which the parties contemplated was such as would result from the action of the courts upon it and the issuing of a patent by the government, in pursuance of their decrees; that the parties evidently thought that if the city should finally succeed in establishing its claim and receive a patent for any of the land within the lines of the Huichica patent it would have the better title to the land and that they could,

therefore, avoid litigation and expense, and safely await the issue of the city's contest, and it was agreed that in case the city established its claim to any of the land he would pay Akers $5 per year for the use of it, etc. This court says: "The Supreme Court decided that no "Federal question was involved. Both of the courts be- "low decided that, irrespective of the Federal question, "the agreement of October 11, 1860, was decisive of the "case. The construction of that agreement involved no "Federal question and controlled the whole case."

In *Adams* v. *Burlington & M. R. R. Co.*, 112 U. S., 123, a question of estoppel was urged against a county where the original title to the land was derived by the county through grant by Congress, is not a Federal question. The court say: "There was nothing in the "swamp land grant to prevent the county from surrend- "ering the land to the railroad company if that was "thought best. Under this defense the validity of the "original title was not disputed. The claim was, that in "legal effect that title had been ceded to the railroad "company and that the county was in no condition to de- "mand it back. There was no dispute about the Federal "right itself, but about the consequence of what had "been done by the parties in respect to it."

III.

THERE WAS NOT AND COULD NOT HAVE BEEN ANY ADJUDICATION IN THE FORECLOSURE SUIT OF THE ISSUES IN THIS CASE.

a. The application for writ of assistance placed in issue only the right of possession of the premises as between

Julius Kirchoff and the receiver. The rights of the parties hereto were in no manner affected by the order issued on said application.

It is contended that the decision of the Federal court upon the application for writ of assistance against the husband of defendant in error is a bar to the present action. It will be remembered that that application was made by the receiver appointed by the court to collect the rents. *It was made fourteen months after the entry of the decree in that cause and over a year after the sale by the master.* The report of sale had been filed just one year prior to the application and had been confirmed nine months prior thereto. *An entire term of court had intervened between the entry of the decree, the sale by the master* and the report of the sale, and the application of the receiver. *The master's report of sale was confirmed and the term of court at which that confirmation was* made had expired. Under those circumstances we fail to see how the court could have set aside the decree or settled any of the rights of the parties upon the application. It had lost all jurisdiction of the case. It is true it might have refused the writ of assistance but the *refusing or granting of this writ could in no manner be an adjudication of the controversy between the parties to this suit.*

The answer to Kirchoff was not filed with any intention of adjudicating in that case the rights of the parties, because unquestionably the court had no jurisdiction at that stage of the proceedings and in that form to pass on those rights. The answer was merely filed and the court asked not to issue the writ for fear that the rights of respondent would be prejudiced by its issuance. That it was not intended to litigate the facts in the case is evident from the answer itself which says that "said Kirchoff

"further states that his solicitors have in course of prep-
"aration a bill in chancery setting up the foregoing facts
"and asking that complainant be required to execute its
"undertakings in the premises. (Pr. Rec., 107.)
It is quite probable that counsel at that time were inclined to the opinion that the proper draft of a bill would be asking the alternative relief as stated in the answer of Kirchoff to the petition; but it is evident that they subsequently concluded that the *proper course was to wait until the company received its deed, as the defendant in error had agreed to do, and then ask that it be compelled to carry out its agreement.*

The entire scope of the application for writ of assistance was to determine whether Julius Kirchoff or the receiver was entitled to the possession of the premises. On that application the court might very properly say that the defendant in error could get no relief in that case and that the court would not undertake to determine who was inthe right, but would by its receiver take possession of the premises itself, leaving her to her proper remedy by the bill which she was about to file, and in the meantime, the court having possession of the premises neither party could be injured.

But it is sufficient to say that *neither of the parties to this case was a party to the application for the writ of assistance*; and the decision on that writ was against Julius Kirchoff only and not against defendant in error. (Pr. Rec., 192.) The defendant in error certainly cannot be bound by a proceeding to which she was not a party.

"A judgment or decree set up as a bar by plea, or re-
"lied on as evidence by way of estoppel, to be conclusive
"must have been made: 1, by a court of competent juris-

"diction upon the same subject-matter; 2, between the "same parties; 3, for the same purpose."

Aspden v. *Nixon*, 4 How., 467.

If the above rule be applied to the foreclosure proceedings, it will be seen that though they were between the same parties and upon the same subject-matter as the present suit, yet they were *prosecuted for an entirely different purpose*, namely, to cut off an intervening title; if applied to the application of the receiver for writ of assistance, it will appear that not only did the court have no jurisdiction in that proceeding, at that time, to determine the matters here involved, but *neither the parties nor the purpose was the same.*

We, therefore, contend that the application for a writ of assistance placed in issue only the right of possession of the premises as between Julius Kirchoff and the receiver, and that the rights of the parties hereto were in no manner affected by the order issued on said application; that the rights of the parties to this suit could not have been determined in the foreclosure case, for the reason, among others, that the court had lost jurisdiction over the said cause; that the application for the writ put in issue only the possession, and not the title; that neither of the parties to this cause was a party to that proceeding, and that the order entered on that application is not a bar, for the reason that the purpose of the proceeding was not to settle the title, and the court did not have jurisdiction of either the parties to or the subject-matter of this cause.

b. The defendant in error did not and could not while claiming under the agreement, as she had a right to do, object to the foreclosure suit, or to the decree therein, or to the deed thereunder, as they were all contemplated by the agreement.

Counsel urge several reasons why the decree in the foreclosure proceedings is conclusive, but they are all based upon the assumption that the company repudiated the agreement in November, 1879, and that Mrs. Kirchoff was apprised of that repudiation in time to have interposed her defense in the foreclosure suit. A full discussion of this point would involve an examination of the evidence, which we apprehend this court will not make. It would be sufficient answer to say that the Supreme Court of the State of Illinois held that the agreement was made, that Warfield, the agent of the company, had authority to make it (Pr. Rec., 305). and that the foreclosure proceedings were carried to decree pursuant to the agreement. As these findings necessarily involve the question assumed by counsel, this court, if necessary to support the decree of the ftate court, will consider those questions of fact determined against counsel's contention.

But, if the court will examine into the evidence and the circumstances surrounding the parties at that time, it will see how absurd is the contention made by plaintiff in error. Kendall, the attorney for the company, had advised the officers of the company that neither Kirchoff nor his wife were personally liable on the note secured by the trust deed. He was also aware that if a settlement of the case was made, it must be made with all parties. The correspondence shows that he was fully alive to all the interests of the company.

There is an intimation in Kendall's testimony that he tendered back to Kirchoff the quitclaim deed which appellee had executed to the company, or that he told him that he might withdraw it, but that Kirchoff declined to take it, insisting upon the company carrying out its con-

tract. He had previously testified that he did not tender it back. (Pr. Rec., 438.) The contradiction in Kendall's testimony arises from the fact that the letter-press copy of the letter from him to the company, dated November 8, 1879, was incorrectly transcribed by the master, and made to read: "I *have* communicated the "company's decision to Kirchoff" (Pr. Rec.,152); whereas the letter itself reads: "I *will* communicate the com- "pany's decision to Kirchoff." (Pr. Rec., 223; Exhibit 40.)

On a subsequent examination of the witness, he, having read over his previous testimony which contained the incorrect transcript of the letter, was of the opinion that he did communicate the company's decision to Kirchoff, and thought that he tendered the deed back to him. The letter itself shows that at the time it was written he had not told Kirchoff of the company's decision, and the deed was recorded at 1 o'clock (record says 10 by mistake) of the same day on which the letter was wrtten. (Pr. Rec., 132.) So that, if he saw Kirchoff and tendered the deed back, he must have done so within a few hours after writing the letter to the company, a condition which renders such tender so improbable that it will require stronger evidence than the mere supposition of Kendall to lend it any weight. There is no evidence that he set aside or offered to set aside the default which he had taken against defendant in error in the foreclosure proceedings, but on the contrary, proceeded to take a decree against her.

If Kendall ever did tell Kirchoff that he might withdraw the deed, he never made the offer in good faith, with the intention of allowing it to be done; because he, as the company's attorney, knew that it was in no position to

surrender the deed. The note was a joint one (Pr. Rec., 191), and Mrs. Diversey, one of the joint makers, having been released from liability thereon some months prior, her co-obligors were likewise released.

1 Parsons on Contracts, 27.
Parmalee v. *Lawrence*, 44 Ill., 405.
Brooks v. *Stuart*, 9 A. & E., 854.

Both Mrs. Diversey and Mrs. Kirchoff had pledged their property to secure Kirchoff's debts, and as a portion of Mrs. Diversey property had been released from the trust deed and she released on the note the very thing which Kendall was careful to avoid would have occurred, and the lien of the trust deed upon Mrs. Kirchoff's property been endangered if not defeated.

At this time no hearing had been had in the foreclosure proceedings, and, in view of the fact that defendant's default had been obtained in pursuance of the agreement, and because of her reliance thereon, upon presenting the facts to the court, she would have had little difficulty in having the default set aside and obtaining leave to interpose a defense. That her defense based on the release of Mrs. Diversey, would have been successful will admit of no doubt.

That Kendall knew that it was impracticable to settle with one of the makers of the note without settling with all, is shown by his letter of January 1, 1879, in which he says that he dare not settle with Kirchoff without settling the whole matter, as it might prejudice the company's rights against Mrs. Diversy. (Pr. Rec., 216.) He must have known that the converse of this was also true; and that he could not settle with Mrs. Diversey without settling with the Kirchoffs. From this it is clear that Kendall

" foreclosure proceedings is a bar to its assertion here,
" that the proceedings in the foreclosure are conclusive.
" We are unable to concur in this position. It was part
" of the arrangement under which the complainant was to
" obtain the two lots in controversy, that a decree of
" foreclosure should be entered, and that the premises
" should be sold under such decree. The decree was
" rendered and the sale made by consent for the purpose
" of clearing different tracts of land mentioned in the
" quitclaim deed, from certain encumbrances. The de-
" cree was not adverse to the interest of complainant,
" but in harmony with her interesst. She is not attack-
" ing the decree, but claiming the enforcement of an
" agreement under which it was rendered; and in our
" judgment there is no ground for holding that the rights
" of complaint were cut off or in any manner impaired
" by the decree."

Upon the last hearing before the Illinois Supreme Court on the appeal from the decree entered upon the accounting, the Supreme Court presented its views as follows:

" It is said the suit is brought to review and set aside
" a decree of the United States Circuit Court and the bill
" is treated throughout the discussion as hostile to the
" foreclosure proceeding in that court, or as attempting
" to obtain relief properly available in that action. This
" is a misapprehension of the scope and purpose of the
" complainant's bill. In our former opinion we said:
" 'After the settlement had been concluded it turned out that
" certain encumbrances existed against some of the prop-
" erty which were subsequent to the trust deed, but which
" would take priority to the quitclaim deed executed by
" complainant and her husband; it, therefore, became nec-

" essary, in order to obtain a perfect title, to go on with " the foreclosure proceedings, which was done.' This " statement is based upon an allegation of the bill to the " effect that it being represented to the complainant by " the attorney of the company that it would be necessary " to foreclose the trust deed in order to make good the " title in the company to the lots before they could take " a mortgage thereon for the installments of redemption " money it was agreed between the parties that the agree- " ment for redemption should not be executed until after " the title had been perfected in the company by foreclos- " ure, but in the meantime the plaintiff should execute " and deliver to the company her quitclaim deed, and " should interpose no defense to such foreclosure. The " allegation was found, in the opinion above referred to, " sustained by proofs, and is conclusive of that fact upon " this appeal.

" The foreclosure decree in the Federal court was, " therefore, as much the result of the agreement relied " upon by complainant as was the making of the quitclaim " deed by her. So far from this being an attempt to re- " view, modify or set aside the decree of the United States " Circuit Court, the right of action is predicated, in part " at least, upon it; whether the bill be called a bill to re- " deem or given another name, can in no way affect the " question of jurisdiction in the state court. The relief " sought is the enforcement of a *contract* to reconvey the " property in question, which we have already held " the complainant entitled to." (149 Ill., 539; Pr. Rec., 516.)

It was urged in the trial court, and also in the state Appellate and Supreme Courts, that the matters involved in this case were *res adjudicata* because of the foreclosure

proceedings in the United States Court, and the sale and deed thereupon.

Upon that question Judge TULEY, on the first hearing in the court below, said: "Assuming that in 1878 the "agents of the defendant made a parol agreement with "the complainant as to the sale back to her of the home- "stead. I find no estoppel by reason of the foreclosure "proceedings. Although they may have been commenced "adversely, the evidence of Warfield and Kendall show "that they were not prosecuted adversely after the mak- "ing of the agreement, and there is nothing inconsistent "in the company deriving title under the foreclosure and "agreement to convey the homestead to complainant "after it had perfected its title by the foreclosure pro- "ceedings. Having received complainant's deed of her "equity of redemption in the mortgaged premises in sat- "isfaction of the mortgage debt to foreclose as against "her."

It will be seen from the above quotations that the effect of the proceedings in the United States Court was carefully considered upon the former hearings of this case in the state courts, and the decision arrived at was that those proceedings furnished no defense, for the reason that they were had with the express agreement that as to the appellee they should have no force or effect, except in so far as they might be for her benefit in removing certain liens upon the title to said premises. Those proceedings were prosecuted equally for the benefit of both parties.

c. The decree in this case does not disturb the foreclosure proceedings, but merely directs a conveyance by the company pursuant to this agreement.

As before stated it will be seen by reference to the bill in

this case that no attack was made upon the decree of the United States Court, nor was that decree or the deed pursuant thereto set up as a bar to the relief prayed. *Referring to the assignment of errors upon the appeal from the Appellate Court to the Supreme Court of Illinois, which decree settled the rights of the parties, we find no claim that due credit and effect had not been given to the proceeding in the United States Court.* (Pr. Rec., 303.) The questions at issue were purely and simply whether or not *as a matter of fact* such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in error was entitled to a conveyance from plaintiff in error; and we fail to see that the plaintiff in error is in any better position, by reason of deriving its title in part under a decree of the United States Court, than it would have been if that title had been derived by virtue of a patent from the government, or in any other manner. We see no reason why the fact that the title which it holds was derived in part by virtue of an authority exercised under the United States should in any manner absolve the plaintiff in error from the performance of its agreement, or that the enforcement of that agreement in any manner discredits the source of its title.

As a matter of fact the master's deed did not transfer the record title from Mrs. Kirchoff to the plaintiff in error. That had already been done by her quitclaim deed, which was originally all that had been contemplated as sufficient to put the legal title in the company so as to enable it to give a deed to Mrs. Kirchoff, who in turn was to give back a mortgage which would be a first lien on the homestead.

We had always supposed that a title acquired by such a decree might be disposed of the same as if acquired in any other manner; that it might be leased, mortgaged, sold, conveyed or devised, the same as a title acquired by an ordinary deed, and a pre-existing agreement would apply to it in the same manner.

Here it is admitted that the company has the title. It acquired that title in part under the quitclaim deed of Mrs. Kirchoff and in part through the foreclosure proceedings in the United States Court; but in whole pursuant to the agreement that when it should be acquired it would be conveyed to the defendant in error. A bill to enforce that agreement is not one attacking that title.

In *Roby* v. *Colehour*, 146 U. S., 161, Roby while holding the title to certain property in which the Colehours were interested, went into bankruptcy and afterward purchased the property at a sale by his assignee. Some years later the Colehours brought suit against Roby to enforce the recognition of their interests in the property and to set aside a deed from William H. Colehour to Roby. Roby set up his own bankruptcy proceedings and claimed title from his assignee in bankruptcy. The case was decided against him and he appealed to the Supreme Court of Illinois, which affirmed the decree of the lower court; upon which he prosecuted a writ of error from the Supreme Court of the United States to the state court, upon the ground that a title or right was claimed under an authority exercised under the United States by virtue of the bankruptcy proceedings. A motion was filed to dismiss the writ of error which this court denied but stated that the question was a close one.

The distinction between that case and this is that in that case there was no agreement as to Roby's purchase from his assignee in bankruptcy. If there had been an agreement that when he should have received title from the assignee he would convey to the Colehours and they had filed a bill to enforce that agreement, and the state court should have directed him to convey accordingly, then the case would have been like the one at bar. There it was claimed that he held the title to a part of the premises in trust and that as to that part nothing passed to the assignee in bankruptcy and that consequently the deed from the assignee conveyed no title to that part. Here nothing of the kind is claimed, but on the contrary it is admitted that the foreclosure proceeding and master's deed did clear the property of an intervening title and must be taken in connection with the deed from defendant in error to vest a good title to the premises in the company, and that title when so vested is not attacked, but it is claimed that the company holds it in trust for the defendant in error by virtue of the agreement which is sought to be enforced.

In *Carpenter* v. *Williams*, Justice MILLER, in delivering judgment said: "It is a mistake to suppose that "every suit for real estate in which the parties claiming "under the Federal government are at issue as to which "of them is entitled to the benefit of that title necessarily "raises a question of Federal cognizance. If this were so "the title to all the vast domain once vested in the United "States could be brought from the state courts to this "tribunal." 9 Wall., 785.

In *Wetherell* v. *Eberle*, 123 Ill., 668, the plaintiff sought to remove a cloud from her title growing out of a deed by the United States marshal, wherein objection is

urged on the alleged ground that the state court had no jurisdiction in regard to the matters relating to acts of a United States Court and its officers. It is urged that the decree disclosed unwarranted interference with legal proceedings in the Federal court.

The court say: "Not only the United States, but all "its officers have ceased to have any power, control or "jurisdiction over the case, the time for redemption ex- "pired and the marshal's deed has been delivered. The "present suit does not attempt to review, revise or inter- "fere with the judgment or processes of the United "States Court, or does it question the validity or even "the regularity of the sale under the execution. The "question as to the validity of the title was not before "the United States Court, and there was clearly no ob- "jection to the appeal on this ground."

In *Murdoch* v. *The City of Memphis*, 20 Wall., 590, the title to certain property had been vested by a deed from the City of Memphis, the defendant in error, and by the ancestors of Murdoch, the plaintiff in error, in one Wheatley, in fee in trust for the grantors and their heirs. "In case the same shall not be appropriated by the "United States for that purpose" (for the purpose of a naval depot). On the 14th of September, 1844, the City of Memphis in consideration of the sum of $20,000 paid by the United States conveyed the said land to the Government on convenant of general warranty, there being, however, in this deed to the United States no designation of any purpose to which the land was to be applied, nor any conditions precedent.

The United States took possession of the land for the purpose of the erection of a naval depot upon it, erected buildings and made various expenditures and improve-

ments for the said purpose but in about ten years after, by an act of August 1854, transferred the land back to the city *for the use and benefit of said city.* The bill charged that by the failure of the United States to appropriate the land for a naval depot, and the final abandonment by the United States of any intention so to do, the land came within the clause of the deed, conveying it to Wheatley in trust, but if not it was not held by the city in trust for the original grantors and the prayer sought to subject it to said trusts.

The court in deciding the case say: "The claim of "right here set up is only to be determined by the "different principles of equity jurisprudence and is un- "affected by anything found in the Constitution, laws or "treaties of the United States, whether decided well or "otherwise by the state court we have no authority to "inquire. According to the principles we have laid "down as applicable to this class of cases, the judgment "of the Supreme Court of Tennessee must be con- "firmed."

"This court has no jurisdiction to re-examine the "judgment of a state court where a Federal question was "not in fact passed upon, and where the decision of it "was rendered unnecessary in the view which the court "below took of the case."

McManus v. *O'Sullivan*, 91 U. S., 578.

Where in a state court both parties to a suit for the recovery of lands claimed under a common grantor whose title under the United States was admitted, and where the controversy extended only to the rights which they had severally acquired under it. Held, that as no Federal question arose this court has no jurisdiction.

Romie et al. v. *Casanova*, 91 U. S., 379.

never had any intention of returning Mrs. Kirchoff's deed to her. The company, after it took her deed, never was in a position where it could place her *in statu quo*, without a sacrifice on its part of many times the value of this property.

In regard to this alleged tender back Kirchoff says (Pr. Rec., 39) that they never gave the quitclaim deed back to him. Warfield says (Pr. Rec., 87) that the deed from Mr. and Mrs. Kirchoff was never tendered back to them to his knowledge. Kendall, before he had been misled by the incorrect transcript of his letter to the company, adverted to heretofore, says that the company never tendered back to Kirchoff a reconveyance of the property, and never tendered back his quitclaim deed. (Pr. Rec., 438.) Kirchoff where he says that "there was "some talk," refers to no particular time, and that conversation may have occurred a year or more after the deed was recorded. He further says that he never saw the deed again.

Kendall says that upon receipt of the president's letter he thinks he tendered the deed back to Kirchoff, or gave him a chance to withdraw it. Let us see what the situation of the parties was at that time. The foreclosure sale did not take place for nearly a year after the date of that letter, and without defendant's deed the company had no title to the premises, but was at most only the beneficiary in the trust deed. Yet DeWitt writes as though the company owned the property. He says that they refused to *sell* upon the terms mentioned but will *sell* upon certain other terms. (Pr. Rec., 273.) What did they have to sell except the title acquired under the Kirchoff quitclaim? Clearly DeWitt supposed that the deed had been delivered absolutely and recorded at that time. In reply

to his letter Kendall before communicating with Kirchoff writes: "I don't think he will purchase but perhaps he "will." (Pr. Rec., 222.) What could Kirchoff purchase at that time unless it was the title which the company acquired under the quitclaim? It, therefore, conclusively appears that at that time Kendall had no intention of returning defendant in error's deed. The deed was recorded the same day and it is more than likely that it was done at the time the letter was sent.

But supposing Kendall *did* offer to let Kirchoff withdraw the deed, and Kirchoff acting for his wife, "con-"cluded to deliver it, insisting that he had a contract," and under those conditions the company accepted and recorded the quitclaim deed, and claimed title under it, by its acceptance under these circumstances would it not be estopped from denying the right of the defendant in error to a performance of the agreement which was a condition attached to its delivery?

It was after this that the defect in the title was discovered and the agreement made that the foreclosure proceedings should go on until that defect was remedied and that the company would then convey. (Pr. Rec., 111, 112.) What basis then is there for the claim that the agreement should have been set up in the foreclosure suit or that the decree in that suit is conclusive? If defendant in error had set up a defense in that suit it would have been in direct violation of her agreement with the company. Neither could she redeem from that suit, because if she had done so, such redemption would have been as to one of the lots for the benefit of an outstanding title. And further, the company had bid in the property at the foreclosure sale at a sum largely in excess of its value to prevent redemption by the intervening claim-

ant. (Pr. Rec., 193.) It is said that if the defendant in error had set up the agreement in that suit, the court would have recognized it and preserved her rights in the decree. The decree was entered just as it was agreed it should be. The court, if it had undertaken to carry out the rights of the parties under the agreement, could have entered no different decree.

Counsel urge *that the alleged repudiation by the company of the contract constituted a breach thereof, and that the plaintiff in error might have at once brought suit for the breach and consequently should at once have interposed a defense in the foreclosure proceedings.* If we should assume (what is not proven) that the company had repudiated the contract in 1879 and notified the plaintiff in error that it would not carry it out, she might have claimed a breach and brought suit, but she was not obliged to do so. *The time had not arrived for performance by the company. They were not to convey until they received a deed under the foreclosure proceedings. The rule is:*

"*The promisee is not bound to treat the renunciation as a*
"*breach. He may, if he pleases, treat it as inoperative;*
"*but in that case he keeps the contract alive for the benefit*
"*of the other party as well as his own. If the promisor*
"*withdraw the notice of his intention not to perform be-*
"*fore the promisee has elected to treat it as a breach, the*
"*latter looses his right to treat the contract as broken*
"*and the parties are in the same position that they would*
"*have been in if the notice had never been given.*"

3 Amer. & Eng. Enc. of Law, 906.

Here by recording the quitclaim deed after the alleged notice that it would not perform, the company withdrew such notice and thereafter the defendant in error not only *need not* but *could not* claim a breach.

c. Till after the master's deed issued Mrs. Kirchoff had no right to demand a conveyance from the company.

Let us suppose that counsel for plaintiff in error had represented Mrs. Kirchoff; how would they have applied their homeopathic remedy and obtained in the United States Court the relief which the state court has adjudged to be due the complainant. Would they, as is to be inferred from their argument, have interposed a defense in the foreclosure case, after their client had been, as they claim, informed that the company would not carry out its agreement? If so, what defense would they have interposed and what would that court have said to them?

Let us imagine the conversation between counsel and the court upon their application to vacate the decree.

"Court: Has not your client conveyed to the company all her title to the premises?

Counsel: Yes.

Court: Was not that deed given, her default taken and this decree entered by agreement?

Counsel: Yes.

Court: And were not the premises to be sold and deeded to the company, pursuant to that agreement?

Counsel: Yes. Everything was done pursuant to the agreement.

Court: And you desire to insist upon your agreement?

Counsel: Yes.

Court: What right then has your client to complain?

Counsel: But the company has not carried out its agreement.

Court: The time has not yet arrived for it to do so.

Counsel: But it says that it will not do so when the time does arrive."

"Court: That is a matter which we cannot determine in advance. You have a valid agreement with the company, and if it fails to perform, you have the same right as any other litigant to go into court and compel the company to convey as agreed."

Having failed to obtain relief in the foreclosure suit because there was nothing in the proceedings, *per se* to complain of, counsel conclude that they will take the advice of the court and compel the company to stand by its contract. But in which court shall they seek the remedy? Counsel say in the United States Court. How will they get in? There are no provisions in the Federal law which, under the facts, will give them that privilege, as their client is a resident of this state. They cannot file an original bill to set aside the decree because the decree was entered by consent pursuant to the agreement, and there are no grounds for vacating it. They cannot file a bill of review for the same reason, and because there are no errors apparent in the decree. They cannot file an original bill in the nature of a bill of review, because the decree was not obtained by fraud, nor otherwise improperly. Consequently they have but one remedy left, that is to compel the company to abide by its agreement, and that remedy can only be applied in the state court.

IV.

THERE WAS NOTHING IMMORAL, INEQUITABLE, IMPROPER OR WHICH COULD HAVE RESULTED TO THE INJURY OF ANY ONE IN THE AGREEMENT.

As to the alleged immorality of the agreement: Counsel say that there were some judgments against Mrs. Kirchoff which were rendered subsequent to the making of the trust deed, but prior to the deed from Mrs. Kirchoff to the company, and that any agreement between the company and Mrs. Kirchoff to the effect that the foreclosure proceedings should be continued to decree and sale

for the purpose of depriving those judgment creditors of their liens would be illegal, immoral, dishonest and fraulent; that the United States Court would have turned with disgust from any attempt to perpetrate such a fraud through its instrumentality.

Counsel have not explained just how anyone would be defrauded, for if there were judgments against the property while the title was in Mrs. Kirchoff the lien of those judgments would again attach when she should be again invested with title by conveyance from the company.

But counsel have made a mistake in regard to the facts in the case, which is by no means a novel experience with them. *There were no judgments against Mrs. Kirchoff which were liens upon the property.* There *had been* judgments against her and a sale had been made of one of the lots under one of those judgments and a sheriff's deed issued. (Pr. Rec., 112.) This deed was an adverse intervening title and not a lien upon the premises. Mrs. Kirchoff desired to retain her home and was paying to the company its full appraised value, and we do not understand why she was not entitled to a clear title to the property. She was certainly under no obligations either legal or moral to redeem this property for the benefit of an adverse claimant. The interests of the parties demanded that the estate should not merge by the execution of the deed to the company, and equity will permit them to be kept separate for the purpose of doing exactly what was done in this case—foreclosing the mortgage and thus cutting off the intervening title.

15 Amer. & Eng. Enc. of Law, 322 *et seq.*

We cannot admire that peculiar ethical faculty of counsel which would turn with such abhorrence from so inno-

cent a transaction, and yet so ably champion this plaintiff in error in its attempt to repudiate an agreement eminently fair to it, and to deprive this defendant of her home, simply because subsequent events seemed to indicate that it would be to its interest to do so.

In *Udell* v. *Davidson*, 7 Howard, 769, which was a writ of error to the Supreme Court of Illinois, affirming a decree which decided that certain land in the hands of Udell was chargeable with a trust and directed that it be sold and the proceeds applied accordingly. The plaintiffs in error defended upon the ground that the transaction between Udell and Gregory, in which they participated, was against the policy and in violation of the provisions of a certain act of 1838, relating to public lands and insisted that by this fraud upon the government he obtained a deed to himself for the land and that he being trustee of certain creditors had used the money which belonged to his *cestui qui trusts* to accomplish his purposes and contended that by means of this fraud upon the government he acquired under this act of congress a right to perpetrate a fraud upon his *cestui qui trusts*, the courts say: "This, in plain words, is the amount of his de-"fense and that is the right or privilege which he claims "under the provisions of the act of 1838 and calls upon "this court to recognize and maintain. We shall not "comment on such a claim."

Plaintiffs in error seem to rely greatly on *Randall* v. *Howard*, 2 Black, 585. There the court says: "The "agreement was only to cover up the real ownership of "the property." In the case at bar, it was to cause the title to be placed in the real owner, where it would be subject to all her just debts. The former case sought to impeach the decree. In the case at bar, the giving of the

deed and the obtaining of the decree were part of the larger agreement with respect to the return, for an agreed sum, of her homestead to Mrs. Kirchoff.

In *Randall* v. *Howard* the arrangement was to fraudulently transfer a life estate into a fee simple title and to defraud creditors. In this case the title was to go directly to the party who had previously held it, and no creditor could be injured, except by refusal of the Insurance Company to comply with its agreement.

In *Randall* v. *Howard* the court says: "The state-"ments of the bill are vague and uncertain and rarely "plain and direct."

In this case the bill is definite and clear, and the court finds that the agreement was made. In that case the courts say: "The nature of the agreement we do not "learn."

In this case the terms are definite.

In that case the courts also say: "There are several "other grounds decisive against the relief prayed for," and proceed to enumerate some of them, namely:

That the bill brought in review various matters passed on in the suit by the Cecil County Circuit Court; that it sought to annul a sale of lands made by virtue of the decree of that court; to effect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him and to invalidate his title. It also found that the money arising from the sale was still undisposed of and that the whole case was under the control of the court, and that not even a supplemental bill was needed to prevent the wrong complained of. In the former case the friendly arrangement

was made after the decree was entered; the decree was not in pursuance of an agreement.

In the case at bar, the title passed by the deed before the decree was entered, and the decree was inoperative as divesting the Kirchoffs of their record title, the same having been done by the previously executed and recorded deed. The bill in the case at bar was not to annul the decree, but it admits and avers that the title passed thereby and by the deed to the Insurance Company, and asks that the company be required to convey as agreed.

The construction which plaintiff in error seeks to give to the decision in *Randall* v. *Howard*, would make it impossible for the complainant in a foreclosure suit to deal with the decree in any way before its entry. If that construction is correct then no agreement as to the disposition of the decree made between the Insurance Company and Mrs. Kirchoff, before the entry of the decree, would be binding although, it might have been reduced to writing and based upon a full consideration. If such a *written* agreement could be enforced the *jurisdiction* of the state court cannot be denied merely on the ground that the agreement was oral. The fact is that the contract was that a partial interest in the property covered by the decree should be vested in Mrs. Kirchoff, but the security of the Insurance Company was not to be impaired. If the company could not make in advance a valid contract with her for such partial interest in the land embraced in the decree when entered neither could it make, in advance, a valid contract to sell the whole or part of the decree or property referred to therein to a stranger. Such a rule surely could not be adopted. Equity, in obedience to the cardinal rule of natural justice that a person should perform his agreement enforces, pursuant

to a regulated and judicial discretion the actual accomplishment of a thing stipulated for, on the ground that what is lawfully agreed to be done ought to be done, and is in contemplation considered as now done.

SECOND.

IF THE COURT SHOULD HOLD THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN SUCH QUESTION WAS CORRECTLY DECIDED.

a. The proper effect was given to the decrees of the Federal court.

The only claim worthy of consideration as supporting the jurisdiction of this court is that the plaintiff in error sets up a title derived under a decree of the United States Court. If that claim is sufficient to support the jurisdiction of this court then the only further question to be determined is whether, assuming the agreement to have been made as alleged, the state court properly decided that, notwithstanding the foreclosure proceedings, the company should be compelled to convey.

What effect is to be given to a judgment or decree of the United States Circuit Court? Only the same effect as the state court would give to its own judgment or decree.

> *Dupasseur* v. *Rochereau*, 21 Wall., 130.
> *Crescent City Live Stock Co.* v. *Butcher's Union Slaughter House Co.*, 120 U. S., 141.

In *Dupasseur* v. *Rochereau*, *supra*, it is said: "The only "effect that can be justly claimed for the judgment in

" the Circuit Court of the United States is such as would " belong to judgments of the state courts rendered under " similar circumstances."

Assuming the agreement to have been made as alleged, and as found by the courts of Illinois to have been proven, was the complainant entitled to the relief granted and to a conveyance from the company, or was she concluded by the decree in the Federal court, which it was agreed between the parties should be entered, in order to perfect the title to the premises in the company.

The title was acquired by the company *under the deed of defendant in error and under these foreclosure proceedings pursuant to the agreement* that as soon as it so acquired title it would convey to the plaintiff in error and and take a mortgage back to secure the sum of $10,000. Having declined to execute that agreement after the title was perfected in it, a court of equity will consider it as holding the title in trust for the security of the $10,000; and because of the pre-existing relations between the parties of the mortgagor and mortgagee the bill may be said to partake in many respects of the nature of a bill to redeem. But courts of equity never regard the form of the transaction. It was to avoid these formalities that the court was originally established, so that every case might be decided upon its own merits and upon the particular facts. It is not necessary that the bill have a specific title. The field of equity is too broad to permit the use of copyrighted forms in its pleadings.

What amounts to a trust or out of what facts a trust may spring, are not Federal questions, and on a writ of error to a state court this court can review only Federal questions.

Smith v. *Adist*, 23 Wallace, 368.

The defendant in error owed the plaintiff in error a sum of money and the plaintiff in error held the title to certain property which it was intended by both parties should belong to the defendant in error and should secure the plaintiff in error the amount of its claim. To that extent the relation of the parties was that of mortgagor and mortgagee.

The statute of the State of Illinois (Chap., 95, Sec. 12) provides that "every deed conveying real estate which "shall appear to have been intended only as security in "the nature of a mortgage, though it be an absolute con-"veyance in terms, shall be considered as a mortgage."

This statute has been in force in the State of Illinois in its present form for the last fifty years, and is only declaratory of the well settled rule applicable to courts of equity and always followed by the courts of that state.

This court has adopted the same rule in no uncertain terms. In *Peugh* v. *Davis*, 96 U. S., 332, the court said:

"It is an established doctrine that a court of equity "will treat a deed absolute in form as a mortgage when "it is executed as security for a loan of money. That "court looks beyond the forms of the instrument to the "real transaction, and when that is shown to be one of "security and not of sale, it will give effect to the actual "contract of the parties. As the equity upon which the "court acts in such cases arises from the real character "of the transaction, any evidence, written or oral, tend-"ing to show this is admissible."

See, also, *Villa* v. *Rodrigus*, 79 U. S., 323, where it is said:

"To give validity to a sale by a mortgagor it must

"be shown that the conduct of the mortgagee was, in "all things, frank and fair, and that he paid for the "property what it was worth. He must hold out no de- "lusive hopes; he must exercise no undue influence; he "must take no advantage of the fears or poverty of the "other party. Any indirection or obliquity of conduct "is fatal to his title. Every doubt will be resolved "against him. Where confidential relations and the "means of oppression exist, the scrutiny is severer than "in cases of a different character. *The form of the in-* "*struments employed is immaterial.* That the mortgagor "knowingly surrendered and never intended to reclaim is "of no consequence. If there is vice in the transaction "the law, while it will secure to the mortgagee his debt, "with interest, will compel him to give back that which "he has taken with unclean hands."

b. The agreement was predicated on a valuable considera- tion, and the property was a proper subject for negotia- tion.

The company's attorney conceded that "they could "make no adjustment with Mrs. Diversey without the as- "sent of the Kirchoffs," and they sought to reform a a description of part of the lands of Mrs. Diversey. (Pr. Rec., 400.) "On January 1, 1879, Kendall, the attor- "ney of the Insurance Company in Chicago, wrote the "company that in his opinion an offer to Mrs. Diversey "to let her retain forty acres of the land would induce "her to give the company a deed of the balance of the "property; that Kirchoff would surrender all his prop- "erty and make an arrangement to buy back his home- "stead at a liberal price, but: 'I do not dare to settle "with him without settling the whole case,' as Mrs. Di- "versy's matters may be complicated by any settlement

"with Kirchoff." (Pr. Rec., 306.) To this the company replied: "If settlement can be made of all compli-"cations and with quitclaims from all parties, we will "consent to let her keep forty acres." (Opinion Sup. "Ct., Ill., Pr. Rec., 306, 309).

The foreclosure suit had been pending for some time prior to the consummation of the agreement, but when the agreement was made the deed from Kirchoff to the company was executed and delivered, and it was expected that the suit would be dismissed.

Suppose there had been no intervening claim or title and no occasion, therefore, for proceeding with the foreclosure would it, in such case, have been claimed that Mrs. Kirchoff could not have insisted upon compliance with the contract, on the part of the plaintiff in error?

The contract had been made and on the part of the defendant in error fully executed. She had parted with her title.

It is, however, claimed that the discovery of the intervening title, a merely incidental matter and her consent to have the same removed by the decree another incidental matter—alike for the benefit of both, ought to deprive her of all rights under the contract and enable the plaintiff in error in a court of chancery to refuse to convey as agreed.

We do not think this court will concur in this view.

Suppose the contract had been by one of two parties to convey to the other a parcel of land which at the time it was supposed the former contracting party owned, and suppose it were later found that he did not have the title but that it was to come by patent from the government, would it be claimed that such parties could not agree to delay the deed till the patent should be issued?

And would it be claimed that such a contract would draw in question the validity of the patent? Surely not. And yet there is no real distinction between such a case and the case at bar.

c. It is not necessary to give the proceeding a label.

In chancery a right presupposes a remedy and the course pursued by the defendant in error was the only course open to her.

Judge GARY, in delivering the opinion of the Appellate Court said (Pr. Rec., 399): "This is an appeal to a "court of equity by the complainant that she may have "her property restored to her upon the terms that she "shall discharge the burden upon it fixed in amount by "agreement."

The state Supreme Court in its first opinion (Pr. Rec., 311) says:

"The witnesses, in speaking of the agreement—some of "them speak of it as one to redeem, while others speak "of it as one to re-purchase. Kirchoff says it was to "get the homestead back. Kendall says that they were "to be allowed to redeem or re-purchase, but this is im-"material; the form of the transaction in a court of "equity is not to be regarded.

"The Kirchoffs conveyed away their right of redemp-"tion to a number of tracts of land (these included) and "in consideration they were to have the two lots free "and clear from the deed of trust upon payment of a "certain sum of money."

In the second opinion by the Supreme Court of the state it is said (Pr. Rec., 516, 517):

"Much of the argument of counsel for appellant is de-"voted to an effort to show a want of jurisdiction in the

"Circuit Court of Cook County, over the subject-matter "of this litigation.

"Whether upon this second appeal that is an open "question, we do not deem it important to determine, "being clearly of the opinion that the position of counsel "is untenable."

"Whether the bill be called a bill to redeem, or given "another name, can in no way affect the question of "jurisdiction of the state court.

"The relief sought is the enforcement of a contract to "re-convey the premises in question, which we have "*already* held the complainant entitled to.

"Her rights grow out of the alleged contract and "not by reason of anything that was done or could have "been done by the Federal court in the foreclosure suit.

"That a court of equity has jurisdiction to enforce the "contract, whether it be called a contract to redeem or "to reconvey, is, we think, too clear for argument." (Pr. Rec., 517.)

d. Though the question relates only to the character of the evidence and is, therefore, as we view it, a matter exclusively for the state courts, yet the agreement was not repugnant to the statute of frauds.

This is pre-eminently a case where an action for damages would not have been availing. It related to the homestead and comes within the rule that equity will interfere and enforce compliance with contracts where damages do not give adequate relief.

The remedy is always successfully invoked where, from the character of the property, it has a special value.

Clark v. *Flint*, 22 Pick., 231.

Chamberlain v. *Blue*, 6 Blackf., 491.

Clearly, the property in this controversy had a peculiar value to the plaintiff, having been her residence for so many years. She was to pay, upon a reconveyance of it, its full market value, and the only inducement for her to solicit a reconveyance or to perform the contract on her part, was the affection which she naturally felt for her home. Should relief in equity be refused she would be without remedy, for, in the language of Chief Justice TAYLOR, in *Williams* v *Howard*, 3 Murph., 74: "There "is no standard by which the price of affection can be "adjusted, and no scale to graduate the feelings of the "heart."

It is true that this is in a measure a parol contract, but it possesses many of the attendant circumstances which combine to take it out of the statute of frauds. Those circumstances are:

1. Part performance and possession.
2. Part performance induced by fraud.
3. The impossibility of placing the parties *in statu quo*.

The appellee executed her quitclaim to the company and refrained from interposing any defense to the foreclosure proceedings. It is true that she did not *take* possession under the agreement, because she was already in possession. It is also true that her husband accepted a lease from the receiver, but it was proven that when he executed that lease it was considered by him and the company's agent as a mere formality, and he was told the rent to be paid thereon should be credited on the amount due under the agreement. (Pr. Rec., 87.)

The execution of the lease in no way transferred the possession to the appellant or to the receiver, because it was a part of the agreement; and after the company ac-

quired title to the premises under the master's deeds and the functions of the receiver had ceased, appellee remained in possession of the premises many months, the deeds having issued on the 21st of January, 1882, and she not vacating the premises until the 1st of May following; nor does it appear that during that time either she or her husband paid any rent for the premises. *She was holding under the agreement.*

Warren v. *Warren*, 105 Ill., 568.

It will scarcely be contended that this controversy is free from the element of fraud on the part of the company. Its refusal to carry out the agreement after having accepted appellee's conveyance executed on the faith that the company would reconvey to her, and after having lulled her into security so that she interposed no defense to the foreclosure suit is deserving of no other name.

It has been frequently held that fraud is a complete reply to the statute of frauds. In *Ryan* v. *Dox*, 34 N. Y., 307, the court say: "The distinct ground upon which "courts of equity interposes in cases of this sort, is "that otherwise one party would be enabled to practice "a fraud upon the other, and it could never be the "intention of the statutes to enable any party to "commit such a fraud with impunity. Indeed, fraud in "all cases constitutes an answer to the most solemn acts "and conveyances, and the objects of the statute are pro-"moted, instead of being obstructed, by such a jurisdic-"diction of recovery and relief." And again: "The "fact that an agreement is void under the statute of frauds "does not entitle either party to relief in equity, but "other facts may; and when they do, it is no answer to "the relief that the void agreement was one of the instru-

"mentalities through which the fraud was effected. "Where one of the parties to the contract, void by the "statute of frauds, avails himself of its invalidity, but "unconscientiously appropriates what he has acquired "under it, equity will compel restitution; and it consti- "tutes no objection to the claim that the opposite party "may procure the same practical benefit through the pro- "cess of restitution, which would have resulted from the "observance of the void agreement."

The doctrine in Illinois is that *when a party induces another to execute a conveyance to him by promising to convey to a third person, he will be considered as holding the title in trust for such third person;* and we fail to see any distinction between such promise and one to reconvey to the grantor.

Langtry v. *Langtry*, 51 Ill., 458.
Fishbeck v. *Gross*, 112 Ill., 208.

Where one of the contracting parties has been induced or allowed to alter his position on the faith of an oral contract within the statute of frauds, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute.

Reed on the Statute of Frauds, Sec. 553.

A conveyance by a husband and wife, passing her dower and homestead rights, is sufficient part performance of a verbal contract that if she would join in the deed the vendor would convey other land to her.

Farwell v. *Johnston*, 34 Mich., 343.

But the agreement does not rest entirely in parol. Kendall on the 1st of November, 1879, forwarded to the com-

pany, for execution, a deed to defendant in error of one of the lots in question, and in the letter of transmittal says: "There was an understanding between Warfield, Kirch-"off and myself that the company would sell this lot back "him," etc. (Pr. Rec., 222) Surely, here is a sufficient *manifestation in writing* to permit the introduction of parol evidence to show what were the terms of the agreement under which the company held title to these lots. And it makes no difference that the correspondence was not with the complainant.

Kingsbury v. *Burnside et al*, 58 Ill., 310.

In *Morrell* v. *Cooper*, 65 Barb., 512, the parties after a sale of the mortgaged premises under a decree of foreclosure entered into a parol agreement, by which the mortgagee was to reconvey to the mortgagor upon payment of the indebtedness. Upon the faith of these promises the mortgagor acquiesced in the sale and omitted to apply by motion to have it set aside. It was there held to permit a party to avoid his agreement under such circumstances would be allowing the statute of fraud to be used as an instrument of fraud instead of a shield against it, and the mortgagee was compelled to convey.

In the case of *Beegle* v. *Wentz*, 55 Pa. St. Rep., 369, Beegle recovered a judgment against Wentz and levied upon certain land belonging to the judgment debtor, and upon which he resided. Wentz claimed his exemptions under the statute. Upon this a parol agreement was entered into between the parties, by which it was agreed that the land should be sold by the sheriff and bought in by the creditor and that upon consideration of the debtor waiving his exemptions Beegle would reconvey to him a part of the premises. Upon obtaining title to the premises

Beegle refused to reconvey and brought ejectment; the defendant set up the parol contract. In delivering its opinion the court said:

"The distinguishing feature of this case is that the "agreement of Wentz was not to acquire a new interest "in the land by parol; but he was the owner of the land; "had a title both legal and equitable and a right to re- "tain so much of the land as would be of the value of "$300. It was this subsisting title which Beegle per- "suaded Wentz to forego by his promise to leave him "his house and fifteen acres and make over to him the "sheriff's deed for that part. This part he was not to "take, but to hold in trust. His language was, that he "did not want to take their home from them. That he "would give them a home of fifteen acres, provided "Wentz would sign some agreement to let him sell the "whole tract; and he would buy the land and give them "a sheriff's deed for the fifteen acres. * * * The "trust in such cases arises *ex maleficio* on the principle "that equity will not permit one to deprive another of "the title which he actually has by such a promise not in- "tended to be performed. * * * Nor does it make "any difference that the title was acquired by Beegle "through a judicial sale."

That case is cited with approval by the Supreme Court of Illinois in the case of *Fischbeck* v. *Gross*, 112 Ill., 208.

The general rule is stated by POMEROY, as follows:

"Whenever a person acquires the legal title to lands "by means of a verbal promise to hold them for a cer- "tain specified purpose, as for example, a promise to "convey them to a designated individual, or to reconvey "them to the grantor and the like; and having thus ob-

"tained the title, frudulently retains, uses and claims "the lands as absolutely his own, so that the whole "transaction by means of which the ownership was ob- "tained is based upon deceit, and is, in fact, a scheme of "actual fraud, such party is regarded as holding the "lands charged with an implied trust arising from his "fraud, and he will be compelled by a court of equity "to execute this trust by performing his agreement "and by conveying the estate in accordance with his "promise."

Pomeroy on Specific Performance, 144.

Plaintiff in error asks what a decree of foreclosure gives if it does not cut off all preceding contracts with the mortgagor respecting the mortgaged premises.

We answer, it cuts off whatever is inconsistent with the decree but an agreement for a decree is not inconsistent with such decree. So a warranty deed divests the grantor of his title but the execution and delivery of such deed does not estop the grantor and grantee from enforcing a previous contract which provides that such deed should be made and that a subsequent disposition should be made of the title so conveyed.

So, also, there is no reason why a binding agreement may not be entered into with respect to a specific use or disposition to be made of land after a decree of foreclosure.

Upon the oral argument in this court on the previous hearing, his Honor, Justice White, put to counsel for plaintiff in error this very pertinent inquiry: "If this "alleged agreement as claimed by the defendant in error "had been reduced to writing, do you say that its en- "forcement would then involve a question of a Federal

" nature? " To which counsel responded in the negative. But how is the plaintiff in error in a better position before this court than it would have been in if the agreement had been reduced to writing? How does the character of the evidence upon which the agreement is established affect the jurisdiction of the court? The Supreme Court of the State of Illinois has found and stated all the material elements of the contract with as much certainty as if it had been reduced to writing between the parties. That finding is conclusive, and if the enforcement of a written agreement specifically stating the terms of such contract as claimed by the defendant in error in her bill would not involve a Federal question, then none is involved in this case.

Many of the citations of plaintiff in error refer to cases where the transactions are illegal and immoral.

They have no application to the case at bar.

e. Issues of fact are not reviewable by this court.

Much space has been covered by counsel for plaintiff in error in a discussion of the evidence upon which the finding of facts by the state courts was based. As we have already stated we do not understand that this court will go into an examination of those questions. In the case of *Roby* v. *Colehour*, *supra*, this court, after deciding as a matter of law, that if Roby was under a trust obligation when he went into bankruptcy and purchased the lands in question from his assignee, he could not, by such purchase, acquire title to the premises which would defeat the interests of his *cestuis que trust*, says: " Whether or " not such relations in fact existed between the Colehours " and Roby as prevented him, consistently with those " relations, from purchasing the lands for himself, in

"other words, whether he was the attorney of the Cole-
"hours when he acquired the legal title, or whether upon
"principles of equity, Roby should be deemed to have
"acquired the title for them and himself, subject to the
"declaration of trust referred to in the pleadings and
"decree, *are not questions of a Federal nature. The*
"*decree below in respect to those matters is not subject to*
"*re-examination by this court.*

"And further, the rule that the Supreme Court
"has no authority to review questions of fact upon
"a writ of error extends also to a case in which
"a state Supreme Court finds against the existence
"of a fact relied upon by the plaintiff in error
"as raising a Federal question; as, where he contended
"that the granting of a town site patent on lands known
"to be valuable for mining purposes did not prevent the
"subsequent location of a mining claim thereon, and the
"court found that the lands were not known to be valu-
"able for mining at the time the patent took effect.

"*Dower* v. *Richards*, 151 U. S., 658 and
"cases cited."

In the case at bar plaintiff in error contended that there was, in fact, no contract; the state court has found the fact to have been otherwise.

In *Dower* v. *Richards*, *supra*, where the whole matter is thoroughly discussed, the court says: "The principal
"ground on which the plaintiff in error seek to reverse
"the judgment of the Supreme Court of California is
"that its decision, in matter of fact, was erroneous and
"contrary to the weight of the evidence in the case;
"but *to review the decision of the state court upon the*
"*question of fact is not within the jurisdiction of this*
"*court.*"

In the legislation of Congress, from the foundation of the government, a writ of error which brings up matter of law only, has always been distinguished from an appeal which, unless expressly restricted, brings up both law and fact.

Wiscart v. *D'Auchy*, 3 Dall., 321.
U. S. v. *Goodwin*, 7 Cranch., 108.
Cohens v. *Virginia*, 6 Wheat., 264, 410.
Hemmenway v. *Fisher*, 20 How., 255, 258.
In re Neagle, 135 U. S., 1, 42; 10 Sup. Ct., 658.

"We have no authority as an Appellate Court, upon a "writ of error, to revise the evidence in the court below "in order to ascertain whether the judge rightly inter- "preted the evidence or drew the right conclusions from "it. That is the province of the jury, or of the judge "himself, if the trial by jury is waived, and it is sub- "mitted to his personal decision."

Mr. Justice STORY in *Hyde* v. *Booraem*, 16 Pet., 169, 176.

In *Kennedy* v. *Effinger* (1885), this court dismissed a a writ of error to the Supreme Court of Appeals of the State of Virginia for reasons stated in the opinion delivered by Mr. Justice FIELD, as follows: "The writ of "error brought by the trustee raises no Federal question "which we can consider. Whether the bond of Effinger "was or was not executed with reference to Confederate "notes *is a question of fact for the state court and not "one of law for this court.*"

155 U. S., 577; 6 Sup. Ct., 185.

So, in *Moreland* v. *Page*, this court dismissed a writ of error to review the judgment of a state court upon a ques-

tion of the proper boundary between the two tracts of land, although the owner of each claimed under a grant from the United States; and Mr. Justice GRIER, in delivering judgment, said: "*It is a question of fact*, depend- "ing on monuments to be found on the ground, docu- "ments in the land office, or the opinion of experts or "surveyors appointed by the court or the parties. *If the* "*accident to the controversy that both parties claim title* "*under the United States should be considered as sufficient* "*to bring it within our jurisdiction, then every contro-* "*versy involving the title to such lands whether it involve* "*the inheritance, partition, devise or sale of it, may with* "*equal propriety be subject to the examination of this* "*court in all time to come.*"

20 How., 522–523.

It is claimed that Warfield did not have authority to make the agreement. The Supreme, Appellate and Circuit Courts of Illinois have said that he did. Judge TULEY said:

"As to the authority of Warfield and Kendall, or War- "field alone, to make the agreement concerning the home- "stead, if any such was made, there can be no question "under the decisions of our Supreme Court in the Owen "White and the Slee cases. The company stands in no "position to question the authority of said agents. It "received and retains the complainant's quitclaim, con- "veying to the company her equity of redemption in all "the mortgaged property, and will not be permitted to "retain the fruits of the agreement and at the same time "repudiate the authority of the agents by whom the com- "plainant's quitclaim deed was obtained."

It is said the correspondence of the agents with the offi-

cers of the company does not harmonize with their statements on the witness stand. Here, too, the language of Judge TULEY is applicable:

"A large amount of correspondence between the company and its agents, Warfield and Kendall, touching "this loan, is introduced to show that the company was "not advised that any such parol agreement with Kirchoff "had been made. Complainant should not suffer, if such "is the fact, because of such failure of the agents to advise their principal, as that is a matter between them, "for which she is in no wise responsible. I am not satisfied from the evidence that all the correspondence between said parties has been produced, and am inclined "to the opinion that it has not been."

The true explanation of the failure of the correspondence to show the agreement more fully, is this: The company had vast interests in Chicago, and these agents were trusted with their administration. They were men of importance, both in their own eyes and in the eyes of the public. They were also salaried agents, whose remuneration bore no relation to the profitable administration of the company's affairs. It was to their interest to make an amicable settlement of the whole matter, and thereby avoid the trouble of an extended litigation. This fact, and the love of aggrandisement, which is inherent in the human species, led to the direct assumption and exercise of an authority which resulted in the making of the agreement in this case. After the arrangements had been completed and carried out on the part of Mrs. Kirchoff, the inevitable necessity of informing the principal arose. After waiting two months Kendall writes the letter of November 1, 1879, in and by which he seeks to obtain the ratification of the agents acts by proposing and

advising the acceptance of terms identical in nearly every respect with the contract. The company, it seems, in a letter to Kendall, objected to the arrangement, and Kendall, upon being advised of that fact, recorded the Kirchoff deed and left events to shape their own course.

The continued employment of these agents depended upon the will of the superior. Displeasure meant dismissal. For Kendall to have dissented from the position taken by the president and returned the quitclaim deed to Kirchoff would have been equivalent to handing in his resignation.

"It is not necessary that the contract should be proved "with that degree of moral certainty that is technically "termed 'beyond a reasonable doubt'; and mere conflict "of evidence is not, of itself, a ground for refusing to "grant the remedy. It is sufficient if the subject-matter "and all the material terms of the contract can be deter- "mined with reasonable certainty from all the evidence; "if the judge can ascertain from all the proofs what the "contract really is, he must decree its execution and in "the words of Lord COTTENHAM, 'he will endeavor to "collect, if he can, what the terms of it really were.'"

Pomeroy on Specific Performance, Sec. 137.

It is urged that Kirchoff was informed that the company would not convey, and that thereafter the foreclosure proceedings were adverse. We will quote again from the opinion of the learned chancellor in the Circuit Court:

"Kendall communicated the company's decision to "Kirchoff, but just when does not appear, and thinks he "tendered the Kirchoff quitclaim back to Kirchoff, al- "though previously in his deposition he had stated that

"he did not know of any such tender being made. Kir-
"choff, when told of the decision of the company, said
"that he had a fair agreement with the company and
"would insist upon its being carried out.

"Upon obtaining abstracts of title it was discovered
"by Kendall that the equity of Mrs. Kirchoff had been
"sold and deeded upon a judgment obtained by E. F.
"Runyan. Kendall thereupon deemed it necessary to go
"on with the foreclosure proceedings, and to amend the
"bill which had been filed by making Runyan, then a
"non-resident, a party, and to serve new notice on Kir-
"choff as a party in possession. This was done on the
"17th of January, 1880. Kirchoff, being notified, went
"to Kendall and Warfield to know what it meant, and
"was in substance informed that it was only for the pur-
"pose of making the title better, and that it would and
"should make no difference so far as his agreement to
"the re-purchase of the homestead was concerned, except
"in delaying the consummation of the agreement."

Examine as well the opinions of the Appellate and Supreme Courts on these questions, and then determine whether under the issues here presented, this court will take upon itself the burden of setting aside the finding of these three courts and disturbing a settlement of rights obtained only after legal controversies lasting fifteen years. The courts of Illinois were influenced by no sectional bias, but only by a desire to do justice between the parties, recognizing that the functions of all courts, national and state, are for the protection of the rights of all.

Respectfully submitted.

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